United States Court of Appeals

for the Second Circuit

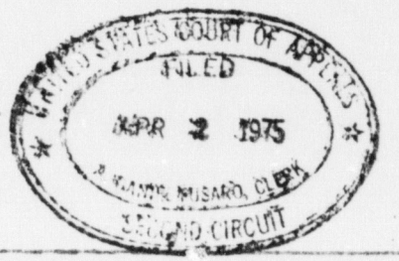
APPELLANT'S BRIEF

75-7028

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 75-7028

FRANCIS X. CALO :
:
Plaintiff-Appellant
: On Appeal from the United States
vs. District Court for the District
: of Connecticut
R. MORRIS PAINE, et al
:
Defendants-Appellees
:



BRIEF OF APPELLANT

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(2) Did the plaintiff state a cause of action under 42 USC 1983 by his allegations that, as a result of his discharge from public employment without advance notice of the reasons for discharge or an opportunity to be heard, the defendants deprived him of his property without due process of law?

(3) Did the plaintiff state a cause of action under 42 USC 1983 by his allegations that, as a result of his discharge from public employment without a hearing or other opportunity to respond to the charges against him, the defendants deprived him of his liberty without due process of law?

(4) Did the plaintiff state a cause of action under 42 USC 1983 by his allegations that the defendants conspired to deprive him of his liberty and his property without due process of law?

(5) Did the District Court err in concluding there were no material facts in dispute between the parties and in treating the defendant's motion to dismiss as a motion for summary judgment?

STATEMENT OF THE CASE

I. SUMMARY OF THE PROCEEDINGS

This civil rights action was instituted by the plaintiff in September, 1974. The defendants are the members of the Waterbury Parking Authority, the members of the Civil Service Commission, the Acting Director of Personnel, and the Mayor of the City of Waterbury. In his complaint, the plaintiff alleged four "causes of action" under 42 USC 1983: (1) a deprivation of liberty without procedural due process; (2) a deprivation of property without procedural due process; (3) deprivation of substantive liberty (First Amendment rights); and (4) a conspiracy by the defendants to deprive him of liberty and property without due process. On September 18, 1974, a hearing was held before the District Court on the plaintiff's motion for preliminary injunction. By agreement of the Court and all parties, the hearing was limited to the claim of lack of procedural due process, since the plaintiff's First Amendment claim was vigorously contested at all points and a hearing covering that issue would have required a full trial of the entire case. In a further effort to limit testimony, the parties entered into a partial stipulation of facts for the record for the sole purpose of determining the issue of temporary relief [Partial Stipulation, Record Doc. No. 16; Transcript pp. 2-15], which was supplemented by some testimony from the plaintiff.

At the preliminary hearing, the defendants filed a motion to dismiss for failure to state "a substantial federal question." [Motion to Dismiss, Record Doc. No. 13]. At the conclusion of the hearing, the District Court orally denied the plaintiff's request for

preliminary relief for failure to prove irreparable harm [Memorandum of Decision, p. 1].

It then construed the defendants' motion as a motion to dismiss for failure to state a claim on which relief may be granted under C.R.Civ.P. 12(b)(6), and, without notice to any of the parties, treated it as a motion for summary judgment under Rule 56. The Court ruled for the defendants on all points and entered judgment for the defendants. Its decision is reported at 385 F. Supp. 1198. The plaintiff has filed this appeal.

II. SUMMARY OF THE FACTS

On October 15, 1973, the plaintiff took a competitive civil services examination for the position of Executive Director of the Waterbury Parking Authority; on March 6, 1974, he was certified for the position as the highest ranking candidate on the list of eligibles; and on March 11, 1974, he commenced employment on a six-month probationary period pursuant to the Rules and Regulations of the Civil Service Commission of the City of Waterbury. In June, 1974, after about threemonths of that period, the defendant members of the Waterbury Parking Authority attempted to force his resignation and, when he refused to resign, on July 5, 1974, at a meeting of the Parking Authority, they fired him effective July 19, 1974, subject to the concurrence of the Director of Personnel, which was obtained the same day. The plaintiff alleged in his complaint that he received no advance notice of the charges against him and no hearing on those charges. Although there is some contest as to the nature and content of meetings held at various times between the plaintiff and the

Parking Authority members, for purposes of its decision the District Court assumed that no notice or hearing which would satisfy the requirements of due process was given [Memorandum of Decision, pp. 3-5]. At the July 5 Parking Authority meeting, a sharply critical statement of reasons for the plaintiff's dismissal was read [see complaint Exhibit A], was picked up by the local press, and was widely circulated in the Waterbury area. That derogatory statement was also placed in his personnel file. The plaintiff then attempted to appeal his discharge to the Civil Service Commission, which refused to grant him a hearing.

The plaintiff has at all times denied the conclusory charges made against him and believes that in fact the basic cause of his dismissal arose in September, 1973, when he ran for city comptroller (and lost) in a Democratic primary election, in which he was a member of a slate of candidates opposed to re-election of the defendant Victor Mambruno as mayor. Approximately a month later, in carrying out his official duties as a member of the Board of Tax Review of the City of Waterbury, of which he was then a member, he resisted attempts by the mayor's office to influence him on certain matters before the Board. In retaliation for this conduct, the defendants unreasonably delayed certifying his appointment to the Parking Authority post and eventually made the appointment only after threat of a mandamus action. They then harrassed him and attempted to interfere with his work as Executive Director, eventually firing him on charges the plaintiff believes are untrue. See Complaint, ¶36-¶51.

ARGUMENT

This action was brought under 42 USC 1983. All defendants are public officials, and all purported to be acting under color of law in removing the plaintiff without a hearing. The plaintiff maintains he has stated a cause of action on four grounds, of which one is substantive (First Amendment), two are procedural, and one sounds in conspiracy. All parties agree that the plaintiff's claims are governed by the companion Supreme Court cases of Board of Regents v. Roth, 408 US 564, 33 LEd2d 548 (1972) and Perry v. Sinderman, 408 US 593, 33 LEd2d 570 (1972), and the cases cited in those opinions.

I. THE PLAINTIFF'S ALLEGATIONS THAT HE WAS DISCHARGED FROM HIS POSITION FOR CONSTITUTIONALLY IMPERMISSIBLE REASONS STATED A CAUSE OF ACTION UNDER 42 USC 1983 AND ENTITLED HIM TO A TRIAL ON THE MERITS OF HIS CLAIM.

The plaintiff's fundamental claim in this action is that he was dismissed from a civil service position in retaliation for his exercise of protected First Amendment rights prior to his appointment. Since the District Court chose to deal with this portion of the complaint by summary judgment rather than by motion to dismiss, it is necessary to review the facts before the Court at the time of its decision.

A. THIS PORTION OF THE PLAINTIFF'S COMPLAINT WAS NOT RIPE FOR SUMMARY JUDGMENT.

The plaintiff initiated this action by filing a verified complaint, sworn to under oath. No trial was held on the complaint, but there was on September 18, 1974, a partial hearing on the plaintiff's motion for preliminary injunction directed solely to the question of whether or not the plaintiff had been accorded procedural due process. The matter was limited in this way, by agree-

ment of counsel, to the area of relatively undisputed facts, because the District Court, in issuing the show cause order for the hearing, had informed counsel that it did not wish to have the entire case tried on the hearing for preliminary relief.

At that hearing, the defendants offered affidavits from four of the defendants dealing with both procedural and First Amendment aspects of the case. Working from these affidavits, the parties attempted to enter into an oral stipulation of facts on the procedural issues so as to restrict testimony at the hearing. The affidavits were entered on the record and the parties recited for the record the parts of the affidavits not stipulated to. The plaintiff then testified as to facts in dispute regarding the extent to which he received notice of the charges against him or a chance to respond.

At no point in these proceedings prior to the filing of the District Court's memorandum of decision did the parties deal with the First Amendment issue in a substantial way. No evidence was taken on it at the preliminary hearing, no stipulation as to facts related to those issues was entered into, and it was well understood by all concerned that there was no agreement on those facts. The plaintiff briefed the issue in its original memorandum of law [Memorandum, pp. 20-24, Record Doc. No. 6], but the defendants did not brief the issue at all in any of their three memoranda [Memoranda, Record Doc. Nos. 14, 15, and 20], and there is no reason to believe that the defendants were seeking the dismissal of any

portion of the complaint other than the part alleging denial of procedural due process. The District Court thus dealt with this portion of the complaint sua sponte.

This background is important in light of the District Court's comments at p. 2 and p. 23 of its memorandum of decision. In treating the motion to dismiss as a motion for summary judgment, the Court noted that affidavits "were submitted by the defendants and not objected to by the plaintiff,"[Memorandum of Decision, p. 2], and it added:

> The defendants submitted in support of their instant motion the affidavits of the defendants in question, all of whom aver that political considerations played no part in the decision to dismiss the plaintiff. The plaintiff did not submit any documentation to contradict the defendants' affidavits, nor was there any contrary evidence presented at the hearing held on plaintiff's motion for a preliminary injunction because of an agreement between opposing counsel to restrict that hearing to the issue of due process violations, ibid., at 23.

Though the Court went on to hold that this "neglect" by the plaintiff was immaterial, it is hard to avoid the suspicion that it infected the Court's decision as to the propriety of summary judgment. In fact, of course, the plaintiff's complaint was verified and the affidavits were not admitted as evidence but merely for their assistance in working out a factual stipulation as to the procedural issues included in them. This is especially prejudicial, since the plaintiff has had no opportunity to respond to those affidavits or cross-examine the parties who made them. As this Court said in Dale v. Hahn, 440 F2d 633 (2 Cir., 1971), at 638:

> While Rule 12(b), F.R.Civ.P., provides that a motion under Rule 12(b)(6) may be treated as a motion for summary judgment under Rule 56, it also provides that 'all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.' It seem fair to include within the term "reasonable opportunity' some indication by the court to all 'parties' that it is treating the 12(b)(6) motion as a motion for summary judgment.

B. AS A GENERAL RULE, NO EMPLOYEE, WHETHER TENURED OR PROBATIONARY, MAY BE DISCHARGED FROM PUBLIC EMPLOYMENT FOR CONSTITUTIONALLY IMPERMISSIBLE REASONS.

In its decision the District Court went on to hold that, even accepting the plaintiff's version of the facts, he had failed to state a cause of action:

> However, this Court is constrained by the ruling of the Second Circuit in Alomar v. Dwyer, 447 F2d 482 (1971), cert. denied, 404 US 1020 (1972) to hold that even assuming such a retaliatory motivation, the plaintiff's constitutional rights were not violated by his dismissal. [Memorandum of Decision, p. 24].

Alomar carves out a narrow exception to the general rule that one may not be dismissed from public employment for the exercise of constitutionally protected rights, and especially First Amendment rights. The Court's reliance on Alomar is misplaced on two counts. First, Alomar concerns patronage employees, not civil service employees, and its rationale clearly does not apply to the discharge of employees appointed pursuant to civil service law. Second, there is substantial doubt about the continuing validity of Alomar in light of the subsequant Supreme Court decisions in Roth and Sinderman, supra.

It is now clear that a public employee may not be dismissed from public employment for the exercise of his constitutional rights.

This rule applies to all public employees, including probationary ones, and without regard to whether the employee has a sufficient property or liberty interest in his job to invoke procedural due process requirements. Thus, in Sinderman the Supreme Court, speaking of Sinderman's claim that the non-renewal of his contract was because of his teacher's union activities said:

> The first question presented is whether the respondent's lack of a contractual or tenure right to re-employment, taken alone, defeats his claim that the non-renewal of his contract violated the First and Fourteenth Amendments. We hold that it does not, 408 U.S. 593, at 596.
>
> [The government] may not deny a benefit to a person on a basis that infringes his constitutionally protected interests -- especially his interest in freedom of speech. For if the government could deny a benefit to a person because of his constitutionally protected speech or assoications, his exercise of those freedoms would in effect be penalized and inhibited, ibid., at 597.
>
> Thus, the respondent's lack of a contractual or tenure "right" to re-employment for the 1969-1970 academic year is immaterial to his free speech claim, ibid., at 597-98. [emphasis added]

The Court then held expressly that Sinderman was entitled to a trial on his First Amendment claim. Cf. Stolberg v. Members of the Board of Trustees for State Colleges of Connecticut, 474 F2d 485 (2 Cir. 1973) (teacher's contract not renewed solely in retaliation forrhis political activities); Connell v. Hogginbotham, 403 U.S. 207, 29 LEd2d 418 (1971) (substitute fourth grade teacher with no claim whatsoever to tenured status dismissed for refusal to sign loyalty oath); Shelton v. Tucker, 364 U.S. 479, 5 LEd2d 231 (1960); Keyishian v. Board of Regents, 385 U.S. 589, 17 LEd2d 629 (1967).

The Sinderman rule has been enunciated in this Circuit. In

Simard v. Board of Education of Town of Groton, 473 F2d 988 (2 Cir. 1973), in which the Court found that the school board had sufficient legitimate cause for not renewing the contract of an activist teacher, a panel of the Second Circuit nevertheless said:

> While we have concluded that adequate evidence supported the Board's action, that does not necessarily defeat a claim of retaliatory non-renewal; a discharge motivated only in part by demonstrable retaliation for exercise of free speech and associational rights is equally offensive to the constitution, ibid., at 995.

The Court thereupon proceeded to review the plaintiff's First Amendment claim on the merits.

Similar language can be found in the decisions of other Circuits and in the District Courts as well. Thus, in Jannetta v. Cole, 493 F2d 1334 (4 Cir., 1974), the Fourth Circuit said:

> Thus, defendants' argument that Janetta had no "right" to a reasonable expectancy of continued employment is immaterial to his free speech claim, ibid., at 1338.

In Fluker v. Alabama State Board of Education, 441 F2d 201 (5 Cir. 1971) the Court declared that "...even if the facts do support the stated reason for the University's action, the appellants would still not be precluded from demonstrating that constitutionally impermissible purposes were also involved," ibid., at 209. See also Skehan v. Board of Trustees of Bloomsberg State College, 501 F2d 31 (3 Cir., 1974), at 39. The plaintiff is entitled to relief even if the actions of the defendants were only partially motivated by retaliation for the plaintiff's political and public activities, and the mere concurrence of protected First Amendment activities with a dismissal which the plaintiff claims was causally related is sufficient to state a cause of action under 42 USC 1983, Lusk v. Estes

361 F. Supp. 653 (N.D. Tex., 1973); Hirsch v. Green, 368 F. Supp. 1061 (D. Md., 1973); Hadjuk v. Vocational, Technical and Adult Education District No. 13, 356 F. Supp. 33 (E.D. Wisc., 1973); Ford v. Jones, 372 F. Supp. 1187 (E.D. Ky., 1974).

The plaintiff here claims retaliation forhis having challenged the incumbent city administration in a Democratic primary shortly before his appointment to this Civil Service post. The right to run for political office and to hold positions of public service is well within the area protected by the First Amendment:

> The right to run for public office touches on two fundamental freedoms: freedom of individual expression and freedom of association. ***A view today, that running for public office is not an interest protected by the First Amendment, seems to us an outlook stemming from an earlier era when public office was the preserve of the professional and the wealthy. Consequently we hold that candidacy is both a protected First Amendment right and a fundamental interest, Mancuso v. Taft, 476 F2d 187 (1 Cir., 1973), at 195-96.
>
> ...[I]t must be conceded that running for public office is one of the means of political expression which is protected by the First Amendment. The right to engage in political activity is implicit in the rights of association and free speech guaranteed by the amendment, Minielly v. State, 411 P2d 69 (Supreme Court,Oregon, 1966), at 73.

See also Kinnear v. City and County of San Francisco, 61 Cal 2d 341, 392 P2d 391 (Supreme Court, California, 1964).

For the defendants' conduct to violate the First Amendment, it is sufficient that it be a substantial infringement of a protected activity. In Bond v. County of Delaware, 368 F. Supp. 618 (E.D. Pa., 1973), a prison guard brought a 1983 action, claiming to have been fired for his refusal to contribute to the Republican Party.

The court rejected the defendants' claim that the plaintiff remained free to vote as he chose:

> Constitutional rights need not be smothered in order for there to be a denial of that; they need only be infringed. To require more would be to provide freedom for only the most durable among us, ibid., at 626-27.

> ...[I]t is only necessary that the restraint on the freedom protected by the Constitution be a substantial one in order that there be a violation. It cannot be doubted that the loss of employment for refusing to contribute to a particular political regime operates as a substantial restraint on the freedom to associate with the party of one's choice. The economic hardship caused by the loss of employment can be, and often is, disastrous. No reasonable person can conclude that such a hardship does not substantially restrain the exercise of free choice, ibid., at 627.

C. THE DECISION IN ALOMAR V. DWYER SHOULD NOT GOVERN THIS CASE.

The District Court, as noted above, felt "constrained"to hold against the plaintiff by this Circuit's decision in Alomarvv. Dwyer, 447 F2d 482 (2 Cir., 1971). Alomar involved an appeal by a patronage employee who was dismissed from her job when she refused to switch her political party registration after a new local administration was elected. The Court held that "the spoils system has been entrenched in American history for almost two hundred years," ibid., at 483, and refused to strike down the spoils system as unconstitutional. The rationale of the Alomar ruling applies only to dismissals from patronage positions:

> ...it is well understood that the victors will reap the harvest of those public positions still exempt from such [i.e., civil service] laws. Indeed many such positions are exempt because a new administration taking office can only carry out its policies by replacing certain officeholders.

> If and when additional exempt positions are to be subject to civil service protection is a matter for action by the appropriate municipal and state authorities and not by a federal court, ibid., at 483-84.

The fact in the present case, however, is that the plaintiff is not a patronage employee but was holding a position of public employment designated by local law as being within the civil service system. He obtained his appointment by placing #2 on a competitive examination for the position for which he was applying (he was elevated to #1 when the #1 candidate declined the job). In accord with the fundamental purpose of the civil service system, his position was deliberately insulated from the political elements. Whatever may be the purpose of a civil service employee's probationary period, it surely is not to test his degree of political loyalty to the incumbent administration. If that were intended by local law to be a legitimate test, the appointment would not have been subject to competitive examination.

Indeed, the District Court's extension of Alomar to probationary civil service employees would undermine the civil service system and come close to a judicial reversal of its goals. In effect, the District Court held that a newly appointed civil servant can be dismissed during his probationary period in retaliation for his political activities prior to appointment. The destructive effect on civil service should be evident: an employee's supervisor could make certain that no such employee ever received tenure, and the civil service system would have been converted, by judicial construction, into a patronage system.

The three cases cited by the District Court at p.24 of its Memorandum of Decision in support of its conclusions are not in

point for the same reason that Alomar is not in point -- each one deals only with patronage employees, American Federation of State, County and Municipal Employees v. Shapp, 443 Pa. 527, 280 A2d 375 (1971); Nunnery v. Barber, 365 F. Supp. 619 (S.D. W. Va., 1973); Moldawsky v. Lindsay, 341 F. Supp. 1393 (S.D.N.Y., 1972). More in point is Hostrop v. Board of Junior College District No. 515, 471 F2d 488 (7 Cir., 1972), which, applying a balancing test, held that a junior college president could not be dismissed for exercising his First Amendment rights.'

In relying upon Alomar, the District Court also confuses the plaintiff's distinct interests in property and in liberty. The District Court had previously rejected the plaintiff's property interest claim and held that, under the Civil ServicesRules, he did not have a right to retain his job. It then went on to hold that, since those rules gave him no property interest, he could not state a cause of action under federal law if he was dismissed for politically motivated reasons. This conclusion ignores the clear teaching of both Sinderman and Simard that an employee's lack of a right to continued employment "is immaterial to his free speech claim," Perry v. Sinderman, supra., at 408 US 598.

This Court should hold expressly that Alomar, if still good law, does not mardate such an in appropriate result.

D. THE ALOMAR DOCTRINE IS NO LONGER GOOD LAW.

For the reasons described above, it should be unnecessary to confront Alomar directly on this appeal. If, however, this Court concludes that Alomar governs this case, then Alomar should be carefully scrutinized. Alomar was decided in 1971. As is clear

from a reading of the opinion there, it relies heavily on Bailey v. Richardson, 86 U.S. App. D.C. 248, 182 F2d 46 (1950), aff'd per curiam, 341 U.S. 918, 95 L.Ed. 1352 (1950), which held that a government employee could be dismissed on account of his political beliefs. Roth and Sinderman were decided the following year, and their rationale has thoroughly undermined the continuing validity of Bailey. Indeed, in Roth the Supreme Court expressly rejected the Bailey doctrine:

> In a leading case decided many years ago, the Court of Appeals for the District of Columbia Circuit held that public employment was a "privilege," not a "right," and that procedural due process guarantees therefore were inapplicable. Bailey v. Richardson, 182 F2d 46, aff'd by an equally divided Court, 341 U.S. 918, 71 S Ct 669, 95 LEd 1352. The basis of this holding has been thoroughly undermined in the ensuing years. For, as Mr. Justice Blackmun wrote for the Court only last year, "this Court now has rejected the concept that constitutional rights turn upon whether a governmental benefit is characterized as a 'right' or a 'privilege."

408 U.S. 564, at 571, n. 9. The most thorough discussion of the impact of Roth on Alomar can be found in Illinois State Employees Union v. Lewis, 473 F2d 561 (7 Cir., 1972), cert. denied, 410 U.S.928, 35 LEd2d 590(1973), in which the Seventh Circuit refused to follow Alomar. That Circuit has recently reaffirmed Lewis in Burns v. Elrod, 43 LW 2351 (7 Cir., 1975).

The Lewis decision is supported by the Fourth Circuit in Jannetta v. Cole, 493 F2d 1334 (4 Cir., 1974), which struck down the dismissal of a fireman for circulating a petition opposing the promotion of a black fireman over whites with greater seniority:

> The Supreme Court has held that, though there may be no "right" to a valuable government benefit, the denial of it may not be predicated on one's exercise of first and fourteenth amendment rights... This principle has been applied on numerous occasions to denials of public employment, ibid., at 1337.

The court goes on to cite, at 1337-38, some thirteen Supreme Court cases upholding this principle. See also Bond v. County of Delaware, 368 F. Supp. 618 (E.D. Pa., 1973), supra.

The District Court also attempts to distinguish Lewis by arguing, at p. 24, n. 4 of its decision, that even under Lewis the plaintiff would not "necessarily" be constitutionally protected:

> The rationale of that case was restricted to employees in nonpolicy-making positions... Although this Court has heard no evidence regarding the job responsibilities of the Executive Director of the Waterbury Parking Authority, it is likely that it is a policy-making position. [emphasis added].

The District Court, however begs the question by "assuming" that the plaintiff holds a policy-making position. The degree of policy-making responsibility is a question of fact, determination of which rests primarily upon the trial judge after a trial. See Indiana State Employees Association v. Negley, 501 F2d 1239 (7 Cir., 1974), at 1242-43. The degree of the plaintiff's responsibility is one of the very facts likely to be put into issue in this case. It was the position of the Parking Authority defendants that his functions were completely and entirely ministerial and that he was prohibited from making policy of his own. It is completely improper for the District Court to decide, without any hearing whatsoever, the degree of the plaintiff's policy-making authority when the existence of any such authority is very much in dispute.

In addition, it was the decision of the City of Waterbury to place the plaintiff's job position within the civil service system, rather than under the patronage system or the mayor's appointive power for policy-making officials. To the extent that Alomar and Lewis, both of which deal with patronage appointments, apply to this case, that choice by the city clearly brings the plaintiff under Lewis rather than Alomar.

The point of the plaintiff's argument is that public employees are protected from unconstitutional discharge by the First Amendment to the Constitution, and the claim by an employee that he was fired for unconstitutional reasons is enough to state a federal cause of action. To the extent that Alomar is good law, of which there is some doubt, it can by nature apply only to patronage appointments. To apply Alomar to civil service employees would be to authorize political terminations within the civil service system, contrary to the principles of that system.

The plaintiff has stated a cause of action under 42 USC 1983 and is entitled to a trial to attempt to prove his case.

II. THE PLAINTIFF'S ALLEGATIONS THAT HE WAS DEPRIVED OF PROPERTY WITHOUT DUE PROCESS OF LAW STATE A CAUSE OF ACTION UNDER 42 USC 1983.

In 1972 the U.S. Supreme Court decided two cases which now stand as the leading decisions on the right of public employees to a hearing prior to termination from their employment, Board of Regents v. Roth, 408 U.S. 564, 33 LEd2d 548 (1972) and Perry v. Sinderman, 408 U.S. 593, 33 LEd2d 570 (1972). These two cases affirm the principle that the government may not deprive an employee

of liberty or property without due process of law, which includes the right to notice of the charges against him and the opportunity to be heard. Thus the Court in Roth said:

> The requirements of procedural due process apply only to the deprivation of interests encompassed by the Fourteenth Amendment's protection of liberty and property. When protected interests are implicated, the right to some kind of prior hearing is paramount. 408 U.S. 564, at 569-70
>
> Before a person is deprived of a protected interest, he must be afforded opportunity for some kind of a hearing, "except in extraordinary situations where some valid governmental interest is at stake that justifies postponing the hearing until after the event"...." [I]t is fundamental [quoting from Bell v. Burson, 402 U.S. 535, at 542] that except in emergency situations (and this is not one) due process requires that when a State seeks to terminate [a protected] interest..., it must afford 'notice and opportunity for hearing appropriate to the nature of the case' before the termination becomes effective. 408 U.S. 564, at 570, n. 7

Due process, however, cannot apply unless the employee's property or liberty is infringed. As a result, the Court in Roth and Sinderman analyzed in detail the sorts of injuries which constitute deprivations of property or liberty. The procedural issues of this appeal involve whether the plaintiff has alleged an injury to property or liberty such that the protections of the due process clause attach.

The plaintiff here was a probationary employee serving on a six-month probationary period who was dismissed approximately halfway through that period. He recognizes that he has no claim to a property interest extending beyond six months, but he maintains that he had a legitimate expectancy of completing his probationary period, and thus a property interest for six months' employment,

analogous to the property interest of a probationary teacher on a one year contract in completing his contract year. He bases this upon two forms of expectancy: (1) the Rules and Regulations of the Civil Service Commission, and (2) the mutual understanding and common practice of all parties as to the duration of probation.

The District Court rejected the plaintiff's claim on the grounds that there were no such mutually explicit understandings, and that the Civil Services Rules gave no entitlement because they authorized "unfettered" discretion. The plaintiff believes that the Court was incorrect on both counts.

The plaintiff's claim of deprivation of property in this action is governed by the rules of Roth and Sinderman. In Roth, the Supreme Court said:

> To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead have a legitimate claim of entitlement to it.***
>
> Property interests... are created and defined by existing rules or understandings that stem from an independent source such as state law -- rules or understandings that secure certain benefits and that support claims of entitlement to those benefits. [emphasis added]

408 U.S. 564, at 577. In Sinderman, the Supreme Court held specifically that a lack of formal tenure did not preclude the teacher's having a property interest in the renewal of his contract and held that such an interest could be implied from state regulations, mutual understandings, or the "common law" of the profession. Thus, under Roth and Sinderman, a property interest can arise from at least (1) state or local law, (2) state or local regulations,

(3) unwritten but generally followed customs and practices, (4) express or implied contracts, or (5) the mutual (but not unilateral) understandings of the employer and the employee.

A. CIVIL SERVICE RULES OF THE CITY OF WATERBURY GAVE THE PLAINTIFF A LEGITIMATE CLAIM OF ENTITLEMENT TO COMPLETE HIS SIX-MONTH PROBATIONARY PERIOD.

There is no dispute that the purpose of the probationary period is to observe the employee's work so as to determine whether he should be retained on a permanent basis. See Memorandum of Decision, p. 9. Waterbury's Civil Service Rules, however, distinguish between terminating a probationary employee during probation and failing to retain him at the end of probation. Mid-probation dismissals are specially governed by Section 5(a) of Chapter IX of the Rules, which states:

> At any time during the probationary period, a department head, with the approval of the Director of Personnel, may remove an employee if in his opinion the working test period indicates that such employee is unable or unwilling to perform the duties of the position satisfactorily or that his habits and lack of dependability do not merit his continuance with the service. Upon such removal, a report in writing shall be sent to the Director of Personnel and to the employee listing the reasons for the removal. [emphasis added]

There is no other provision in the Rules providing for mid-term dismissal. A copy of the full Civil Service Rules is attached to this brief as Appendix A.

The District Court concluded that "The joint discretion given to the department head and the Director of Personnel was clearly intended to be unfettered. The above-quoted regulation provides no support for plaintiff's argument that at least during the six-month

probationary period such discretion was to be curbed..." But this conclusion runs in the face of the language of the Rules, which do create a property interest in the completion of probation for at least three reasons.

First, they preclude a dismissal during probation except upon certain specified grounds:

> (1) That the employee is "unable or unwilling to perform the duties of the position satisfactorily;" or
>
> (2) That "his habits and lack of dependability do not merit his continuance with the service."

Although these standards obviously have subjective elements, they are basically objective standards and are strikingly different from a proviso that an employee can be fired "at will" (cf., C.G.S. 7-417). The plaintiff is clearly entitled to expect as a matter of municipal law that he will not be dismissed except upon those grounds.

Second, Section 5(a) expressly guarantees the probationary employee a written statement of the reasons for his removal. This obviously means that an employee cannot be dismissed without reasons. This confirms that the Rules require a limited form of cause for the mid-probation dismissal of an employee.

Third, Section 5(a) expressly prohibits a department head from dismissing an employee during probation solely on the basis of his own discretion. That section permits him to act "if in his opinion" certain grounds for removal exist, but he can nevertheless dismiss only with the approval of the Director of Personnel. For that

reason, he is required to submit a written report of the reasons for the removal to the Director of Personnel, who is not an employee of the Parking Authority but of the Civil Service Commission. This system of checks and balances between the appointing agency and the Director of Personnel, as the agent of the civil service system, implies that the Director is supposed to make an independent evaluation of the legitimacy of the grounds stated. There would otherwise be no purpose to his having to approve a removal before it could take effect. Furthermore, unless the rules intend that the Director of Personnel rubber stamp the agency's decision, he must have access to the employee's side of the issue as well as that of the appointing agency.

These restrictions on the power of the agency to dismiss during probation provide the employee with a legitimate expectation that he will not be discharged mid-probation except in accordance with the standards of the rules, and those standards provide for a modified version of cause. Thus, the District Court is wrong in stating that the rules provide for the exercise of "unfettered discretion", either by the agency head or by the agency head and the director of personnel, acting jointly.

The District Court's rejection of the property interest claim rests upon two unarticulated misconceptions. First, the Court seems to feel that a regulation, to create a property interest, must provide a detailed statement of grounds for dismissal. This is not the law. The Roth and Sinderman Court seems to say that, at least under some circumstances, the phrase "sufficient cause" may be enough to

create a property interest, 408 U.S. 578, 408 U.S. 603-04. See also the discussion of Goldsmith v. Board of Tax Appeals, 270 U.S. 117, 70 LEd 494 (1926) in Roth, 408 U.S. 576, n. 15. Compare the Supreme Court's construction of the phrase "appropriate determination" in Joint Anti-Fascist Refugee Committee v. McGrath, 314 U.S. 123, at 136, 95 LEd 817, at 835 (1951). See also Simard v. Board of Education of Town of Groton, 473 F2d 988 (2 Cir., 1973), at 992, n. 6, which recognized that cause need not reach the level of tenure to create a property interest, and Sigmon v. Poe, 381 F. Supp. 387 (W.D. N. Car., 1974), at 392 where the Court held that a statute prohibiting the termination of teachers for "arbitrary, capricious, discriminatory or for personal or political reasons" gave a probationary teacher a right to be heard.

The issue is thus whether an employee has a right to expect he will not be dismissed unless some standard for discharge is satisfied. If that standard is reasonably ascertainable, it does not matter that it is phrased in general language.

The second misconception is that an employee can have no legitimate expectancy that he will be retained for six months, unless given notice and a hearing, where local law clearly does not give him a right to a hearing. (See Memorandum of Decision, p. 11). This view mistakes the issue. If the employee has a legitimate claim of entitlement not to be fired without cause, then he has a property interest for the duration of that claim. If he has a property interest, then due process attaches as a matter of federal law, regardless of whether or not state law provides hearing procedures.

This issue has been conclusively resolved by the Supreme Court in Arnett v. Kennedy, 416 U.S. 134, 40 LEd2d 15 (1974), a case which generated no majority opinion but in which a 6-3 majority held:

> While the legislature may elect not to confer a property interest in federal employment, it may not constitutionally authorize the deprivation of such an interest, once conferred, without appropriate procedural safeguards. As our cases have consistently recognized, the adequacy of statutory procedures for deprivation of a statutorily created property interest must be analyzed in constitutional terms, 40 LEd2d 15, at 40-41 (Powell, J.)
>
> While the State may define what is and what is not prpperty, once having defined those rights the Constitution defines due process, and as I understand it six members of the Court are in agreement on this fundamental proposition, ibid., at 51 (White, J.)

See also ibid., at 65-66 (Marshall, J.) and compare with the contrary view, ibid., at 32-33 (Rehnquist, J.). See also Roth, supra., at 576-78; and Bottcher v. State of Florida Department of Agriculture and Conservator Service, 361 F. Supp. 1123 (D. Fla., 1973), at 1129 ("The mere fact that state law may not have designated defendants' action resulting in plaintiff's reassignment in the case sub judice as a recognizable appealable form of agency action, does not end this Court's inquiry here?).

The Civil Service Rules of the City of Waterbury thus provide the plaintiff with a six-month property interest in his job, and thus with a right to notice and hearing before termination during his probationary period.

B. THERE WAS A MUTUAL UNDERSTANDING BETWEEN ALL PARTIES, REFLECTING THE USUAL PRACTICE OF THE CIVIL SERVICE SYSTEM, THAT THE PLAINTIFF WAS ENTITLED TO COMPLETE HIS SIX MONTH PROBATIONARY PERIOD.

The plaintiff maintains that it was the understanding of all parties and the usual Civil Service practice that his probation was to last a fixed period of six months. This was implicitly admitted by the defendant Civil Service Commission members in their conditional stipulation of facts [Record Doc. No. 16], which admitted Paragraph 20 of the plaintiff's complaint, except for the phrase "Connecticut law and." The District Court did not deal with this claim in any detail, merely commenting that "In this case, there was neither a formal contract of tenure nor such mutually explicit understandings. [Memorandum of Decision, p. 9] As no evidence whatsoever was taken on that subject, it is unclear to the plaintiff upon what that statement was based to the extent it regards mutual understandings (the plaintiff agrees that he had no employment contract).

The Supreme Court in Roth recognized that "understandings," 408 U.S. 577, between the employer and the employee may create a property interest, and in Sinderman it held that

> ...there may be an unwritten "common law" in a particular university that certain employees shall have the equivalent of tenure.*** ...we agree that the respondent must be given an opportunity to prove the legitimacy of his claim of such entitlement in light of "the policies and practices of the institution."

408 U.S. 602-03. See, as examples, Gordenstein v. University of Delaware, 381 F. Supp. 718 (D. Del., 1974) ("...the employee's entitlement may derive from informal and perhaps unwritten sources

such as institutional policies and practices which provide objective assurance that he will be secure in his position unless he falls short of some established standard of performance," at 723); and Sigmon v. Poe, 361 F. Supp. 387 (W.D. N. Car., 1974) (Board of Education's "practice" of giving probationary teachers notice of nonrenewal was enough to create property interest).

Mutual understandings and agency practice, if disputed, are inherently a question of fact and cannot be resolved on summary judgment. The plaintiff is entitled to a trial to attempt to show the existence of these elements of a property interest, Perry v. Sinderman, at 408 U.S. 603.

C. A MID-TERM DISCHARGE DEPRIVES AN EMPLOYEE OF PROPERTY EVEN THOUGH HIS EMPLOYER COULD LEGITIMATELY HAVE DISCHARGED HIM AT THE END OF HIS TERM.

If this Court concludes that the plaintiff had a six-month property interest in his job, it is clear that a discharge before the end of the six-month period is a deprivation of a property interest. See Wieman v. Updegraff, 344 U.S. 183, 97 LEd 216 (1952); Roth v. Board of Regents, supra., at 408 U.S. 577.

The present case is analogous to that of a probationary teacher fired mid-term during the period of his contract. Numerous cases have rejected the legitimacy of the mid-term discharge of probationary employees without notice or hearing. See, for example, Wagner v. Little Rock School District, 373 F. Supp. 876 (E.D. Ark., 1973); Skehan v. Board of Trustees of Bloomsberg State College, 358 F. Supp. 430 (M.D. Pa., 1973), aff'd 501 F2d 31 (3 Cir., 1974); Bhargave v. Cloer, 355 F. Supp. 1143 (N.D. Ga., 1972) ("It cannot be said that plaintiff did not possess an expectancy that she

would be allowed to complete the current school year as called for by her contract... Under these circumstances the court concludes as a matter of law that plaintiff was entitled to a hearing prior to the termination of her contract, " ibid., at 1145); Carpenter v. City of Greenfield School District No. 6, 358 F. Supp. 220 (E.D. Wisc., 1973) ("The U.S. Supreme Court in Board of Regents of State Colleges v. Roth... made it clear that different interests are implicated when a school board fails to renew a contract and when, as here, the board dismisses a teacher during the term of her contract," ibid., at 225); Nichols v. Eckert, 504 P2d 1359 (Supreme Court, Alaska, 1973), at 1366. Also see the pre-Roth case of Cooley v. Board of Education of Forrest City School District, 453 F2d 282 (8 Cir., 1972), at 285-87, cited in Nichols, which discusses the more severe impact on an employee of mid-term discharge.

The plaintiff in this action was not a probationary school teacher on a one-year contract but a probationary department head on a six-month working test period. That the full probationary period is six months was understood by all parties to this action. The principle, however, remains the same. The school teacher's claim of entitlement for a mid-term dismissal arises from a written contract. The plaintiff's claim arises from the provisions of local law and practice and mutual understandings. That law treats mid-term dismissal and non-retention at the end of the term in substantially different ways and establishes substantially different rights. The plaintiff here had a property interest in completing his probationary period, and was therefore entitled to the requirements of due process.

The District Court cites Canty v. Board of Education of the City of New York, 470 F2d 1111 (2 Cir., 1972), cert. denied, 412 U.S. 907, 36 LEd2d 973 (1973), in support of its construction of the plaintiff's property interest. The plaintiff in Canty was a regular substitute junior high school teacher on probationary status. He was dismissed after a hearing, followed by two appeals within the school system, and his appeal to the Second Circuit centered on his claim that he was entitled to a full trial-type hearing. In contrast, the plaintiff Calo received no hearing at all and has made allegations as to the nature of his property interest which do not appear to have been raised in Canty. Canty does stand for the proposition that a unilateral expectation of tenure does not create a property interest, but the plaintiff does not dispute that proposition. On its facts and holding, Canty is at most ambiguous in its applicability to this case. Thus it holds:

> The mere subjective expectancy of tenure did not entitle appellant to the full scale due process hearing to which a government employee is entitled when this employment falls within the Fourteenth Amendment's protection of liberty and property, *** With no contract rights, no tenure or rights thereto, a substitute teacher in the position of the appellant is not entitled to a full trial-type hearing. [emphasis added], ibid., at 1113.

Canty thus rests on a factual situation different from the one here. The plaintiff here has alleged applicable local rules that give him a legitimate expectancy of completion of his probationary period. In addition, the plaintiff is entitled to a trial on the facts to show the practice and understanding of the parties as to the mutual nature of the expectancy that he would serve for six months. It was therefore improper for the District Court either to

dismiss this portion of the complaint or to enter summary judgment without a trial.

III. THE PLAINTIFF'S ALLEGATIONS THAT HE WAS DEPRIVED OF LIBERTY WITHOUT DUE PROCESS OF LAW STATE A CAUSE OF ACTION UNDER 42 USC 1983.

Although the Supreme Court found no liberty interest at stake in Roth, it spelled out two circumstances when such a liberty interest would be present:

> (1) Where the government makes "any charge against him that might seriously damage his standing and associations in the community," or where a person's "good name, reputation, honor, or integrity is at stake because of what the government is doing to him," 408 U.S. 573. The Court cited such charges as dishonesty or immorality as specific examples but did not limit this category to such charges.
>
> (2) Where the government "imposed on him a stigma or other disability that foreclosed his freedom to take advantage of other employment opportunities," ibid.

See also Birnbaum v. Trussel, 371 F2d 672 (2 Cir., 1966), which remains good law. The first category deals generally with reputation and community standing, the second with future employability. It is important to observe that, under the second of the two Roth categories, it is not the charges per se that create a liberty interest but the disability or stigma that the charges impose on the employee's efforts to find future employment. The issue on this appeal is whether the plaintiff's allegations have brought the plaintiff within the rule of Roth.

Following the analysis of Roth, the District Court examined each of these two liberty interests, labeling the first "reputational" and the second "employability." It rejected the

plaintiff's reputational claim on the ground that the plaintiff cannot complain of adverse publicity where he himself caused the uncomplimentary statements to be published. It rejected his employability claim on the ground that the charges levied against him were not of such a nature to stigmatize him per se and thereby interfere with his future employability.

The plaintiff disagrees with the District Court in three respects and submits: (1) that he was not the initiator of the adverse publicity in question; (2) that the charges against him were in fact per se stigmatizing, as to both his employability and his reputational interest; and (3) that, if the charges were not stigmatizing per se, he is entitled to a trial to show the destructive effect the charges have had on his reputation and his employability.

A. PLAINTIFF DID NOT INITIATE DISSEMINATION OF THE CHARGES AGAINST HIM.

There is no dispute that the charges against plaintiff were widely disseminated in the local press. Copies of some of the articles about his discharge were attached to the original complaint, [Complaint, Exhibits C through P], and the District Court conceded that the charges were spread throughout the Waterbury community. The Court, however, concluded that the plaintiff had himself initiated these charges. It wrote:

> However, those charges were contained in the July 5 letter from the Authority to the Civil Service Director, the contents of which would have been disclosed to the plaintiff, but would not have been made public but for the plaintiff's explicit request that they be made part of the public record of the July 5 meeting.

> Plaintiff cannot himself cause uncomplimentary statements to be publicized and then rely upon such publication to establish an injury to his reputation. But for the plaintiff's own action, the public would only have known that he was being dismissed for generally unsatisfactory work. [Memorandum of Decision, pp. 13-14]

This statement by the District Court is erroneous in important parts, and the Court has precluded correction of those errors by its grant of summary judgment in this action.

The plaintiff never requested that the charges against him be made "public," but that he be notified of the charges against him, so that he could respond to them. Thus, the plaintiff's attorney stated at the hearing on the preliminary injunction [Transcript, p. 14]:

> MR. PODOLSKY: The one other point that I wanted to mention was in the second paragraph on page four, as I stated in chambers, that the plaintiff requested that the charges against him be made known to him, and that is what he meant by any request that the charges be made public. He did not request the charges be published in the newspaper or anything equivalent to that.
>
> THE COURT: Yes. All right. He didn't request it to be made public; he requested that they be made of record. Is that it?
>
> MR. PODOLSKY: It be made of record. He made that request on several occasions, including at the public meeting of July 5th.

The plaintiff's request for notice was made on numerous private occasions prior to July 5, 1974, and it was usually met with a response that the plaintiff "already knew" what the charges were, a statement which the plaintiff consistently denied. Three days before his dismissal, the defendant Parking Authority members finally offered to discuss informally with him the reasons for his

imminent discharge, but even then they refused to provide him privately with a written statement of charges or reasons. When the plaintiff was fired by the defendant Parking Authority members at their meeting on July 5, 1974, the plaintiff still had not been informed of the nature of the charges against him, and he continued to request that he be so informed. It was only then, after his discharge had been voted by the defendants, that they agreed to inform him of the charges, which were read, with his consent, at the July 5 meeting, after the vote to discharge him. Until he heard the charges at that meeting, the plaintiff did not know what they were or how serious their allegations were. These are the facts that the plaintiff's attorney intended to convey by his statements in court on September 18, 1974. The defendants, having refused to comply with the plaintiff's private requests for a written statement of the charges against him should not be permitted now to plead that he "asked" them to make a public statement of the charges.

It is clear from the District Court's opinion that the Court did not understand the plaintiff's version of events in the same way. The transcript shows that the Court rephrased the statement that the charges "be made known to him" as that they "be made of record." Plaintiff's counsel, in accepting this phrasing, meant that the plaintiff wanted a written record of the charges (in contrast to an informal oral discussion). The court took this to mean that the plaintiff wanted the charged to be of public record,

and from there concluded that the plaintiff himself caused the charges to be publicized.

This difference of fact is important, since the Court did not analyze the extent to which widespread publicity might have constituted a deprivation of reputational liberty. See, for example, Birnbaum v. Trussel, 371 F2d 672 (2Cir., 1966); Newcomer v. Coleman, 323 F. Supp. 1363 (D. Conn., 1970); Wisconsin v. Constantineau, 400 U.S. 433, 27 LEd2d 515 (1971); Hirsch v. Green, 368 F. Supp. 1061 (D. Md., 1973). Had the Court refused to decide this matter on summary judgment, these important factual differences might have been clarified, and the Court could then have made its proper assessment of credibility.

B. THE CHARGES AGAINST THE PLAINTIFF WERE PER SE STIGMATIZING AND INJURIOUS TO REPUTATION.

The charges made by the defendant Parking Authority members against the plaintiff, which also appeared in the newspaper and were placed in his personnel records, were as follows:

> During this probationary period, due to his lack of tact, his abrasive personality, his lack of respect and consideration for the knowledge, ability, time and interest of personnel of the Parking Authority, his over-reacting to unfamiliar situations, his ma[illegible] moves and statements without sufficient knowledge or background of matter under consideration, have caused employee relations to deteriorate very markedly with the result that performance has suffered and public relations have suffered.
>
> Lacking cooperation, credibility and respect, there is no way in which the operation of the Authority can continue to be successful. No purpose would be served in continuing the probationary period, since the situation has already become intolerable and is not one which can be remedied by additional exposure and/or training. The many incidents of conflict involve not only personnel of the Authority but

> members of the public and others with whom the Authority has relations. Irreparable damage may have been done already.

The District Court described these allegations as "merely" charging the plaintiff with "lacking the personality traits necessary for the position of Executive Director." [Memorandum of Decision, p. 22]. A fair reading of these charges compels the conclusion that the Court has grossly understated their severity.

The District Court erred in two ways. First, it mischaracterized the charges, so as to treat them as less severe than they actually were. Second, it adopted a test for determining the stigmatizing effect of allegations that is more restrictive than a reading of the cases justified.

1. THE CHARGES AGAINST THE PLAINTIFF WERE MORE SEVERE THAN THE DISTRICT COURT RECOGNIZED.

The District Court below ruled that the plaintiff could claim a deprivation of liberty only if the charges against him were per se stigmatizing. It defined the test as:

> A dismissal statement is stigmatizing if it charges an employee with immorality, dishonesty or some serious personality defect or societally condemned status which is beyond the power of the individual to change.. [Memorandum of Decision, p.2]

Using the Court's standard, the plaintiff submits that the charges against him fell well within the category of 'some serious personality defect or societally condemned status which is beyond the power of the individual to change.'

The District Court stresses those parts of the statement of reasons describing the plaintiff as abrasive, overly quick to judge, and difficult to work with. It ignores the harsher parts

of the letter. Viewed in the light least derogatory to the plaintiff, the charges still claim that his incompetence and mismanagement of his responsibilities was so severe as to "have caused employee relations to deteriorate very markedly," to have done "irreparable damage" to the Parking Authority, and to have made the continued employment of the plaintiff "intolerable." [Complaint, Exhibit A] Furthermore, they pass well beyond the bounds of charges related to competence, since they attack his character as well. Thus, he is charged with "lack of respect and consideration" for others, "abrasive personality," "lack of tact," and "lacking cooperation, credibility and respect." These charges amount to allegations of severe character defects, strongly suggest emotional instability, and certainly imply that the plaintiff ought not to be hired by any employer for a job that involved regular dealing with other human beings. They are enormously different from a "mere" allegation that the plaintiff was unsuitable for this particular job, or even that he did not properly obey the rules of the job. Short of submission to therapy or other psychiatric or psychological counseling, it is hard to see how these defective character traits are within the plaintiff's capacity to change. Furthermore, the tone of the letter, taken as a whole, precludes an interpretation that the letter represents constructive criticism or that it suggests that the plaintiff might make a desirable employee somewhere else. Any fair reading of the letter would view it as a powerful attack on both competence and character.

2. THE DISTRICT COURT DEFINITION OF PLR SE INJURY TO REPUTATION IS TOO NARROW.

The District Court reads the cases too narrowly in assessing

the extent to which allegations against character and competence have been held damaging by the courts. A fair reading of the cases suggests that the Court should have included, in addition to the standard it cited, the additional categories of (1) highly offensive or severe personality or character defects and (2) gross incompetence. In addition, there are exacerbating factors, such as the degree of publication and the timing of the dismissal, which may raise lesser charges to a deprivation of liberty. It is only over whether allegations of "mere" incompetence are sufficient to constitute a deprivation of liberty that the courts have divided; and the rule in this Circuit appears to be that something more than "mere" incompetence must be alleged, Russell v. Hodges, 470 F2d 212 (2 Cir., 1972).

The District Court's opinion cites a number of cases finding stigma under that court's standard, Wisonsin v. Constantineau, 400 U.S. 433, 27 LEd2d 515 (1971); Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123, 95 LEd 817 (1951); McNeil v. Butz, 480 F2d 314 (4 Cir., 1973); Newcomer v. Coleman, 323 F. Supp. 1363 (D. Conn. 1970); Suarez v. Weaver, 484 F2d 678 (7 Cir., 1973); Dale v. Hahn, 440 F2d 633 (2 Cir., 1971); McAuliffe v. Carlson, 377 F. Supp. 896 (D. Conn., 1974). See also the much cited case of Birnbaum v. Trussel, 371 F2d 672 (2 Cir., 1966).

The District Court, however, fails to incorporate a large variety of additional instances in which the charges made did not reach the level of dishonesty, immorality, or character defects "beyond the power of the individual to change," but instead represent gross incompetence or highly offensive personality defects

and in which the courts found deprivations of liberty. In Hostrop v. Board of Junior College District No. 515, 471 F2d 488 (7 Cir., 1972), for example, the charges were failure to devote full time to duties, withholding information from superiors, and failure to give attention to certain problems. In Hunter v. City of Ann Arbor, 325 F. Supp. 847 (E.D. Mich., 1971) they were insubordination, improper taking of sick leave, and failure to devote full time to the job. In Carpenter v. City of Greenfield School District No. 6, 358 F. Supp. 220 (E.D. Wisc., 1973) it was "screaming at her pupils, inflicting degrading punishments, failing to prepare lesson plans, and failing to abide by various minor rules of the school," ibid., at 226. In Ford v. Jones, 372 F. Supp. 1187, (E.D. Ky., 1974) the charges were "insubordination, lack of rapport, and misrepresentation," ibid., at 1188. The charges in Buggs v. City of Minneapolis, 358 F. Supp. 1340 (D. Minn., 1973) were "gross misconduct, insubordination, and hostile attitudes towards fellow employees, both superior and subordinate," ibid., at 1340. In Simmonds v. Government Employees' Service Commission, 375 F. Supp. 934 (D. St. Croix, 1974), the charges were insubordination, disregard of departmental rules, and wrongful claim for four days pay. In Hirsch v. Green, 368 F. Supp. 1061 (D. Md., 1973) they were unprofessional conduct from testifying at a grand jury hearing against a superior.

In addition, some cases cited by the District Court more properly belong in this category as well. For example, Newcomer v. Coleman, supra., primarily involved public charges of maladministration, and Suarez v. Weaver, supra., really concerned charges of gross professional incompetence.

It is true that in a number of these cases the courts have suggested that the charges included some allegation of dishonesty. But it has often taken a great deal of stretching to find dishonesty in the charges. See, for example, Hostrop v. Board of Junior College District No. 515, supra. If we take the District Court's suggestion, however, and look at what the courts have actually done and not what they say they are doing (see Memorandum of Decision, p. 17), it is evident that the standard applied is not as rigid as the one suggested by the District Court.

It is only where the charges have not gone beyond "mere" incompetence that the federal courts have divided. Compare, for example, Ortwein v. Mackey, 358 F. Supp. 705 (M.D. Fla., 1973) and Whitney v. Board of Regents, 355 F. Supp. 321 (E.D. Wisc., 1973), with Berry v. Hamblin, 356 F. Supp. 306 (M.D. Pa., 1973) and Lipp v. Board of Education of City or Chicago, 470 F2d 802 (7 Cir., 1972).

The cases cited by the District Court do not necessarily lead to a contrary result. For example, in Swyah v. United States, 355 F. Supp. 1008 (C.D. Cal., 1973) the statement of reasons for discharge expressly stated that it "reflects in no way upon your intellectual or personal integrity," and the court noted that "this is not like saying the plaintiff is totally inept," at 1015. The reasons cited in Heaphy v. U.S. Treasury Department, Bureau of Customs, 354 F. Supp. 396 (S.D.N.Y., 1973), clearly involved charges of ordinary incompetence only. In Perkins v. Regents of the University of California, 353 F. Supp. 618 (C.D. Cal., 1973), the plaintiff received no reasons at all. Abeyta v. Town of Taos, 499 F2d 323 (10 Cir., 1974) similarly involved claims of incompe-

tence, and the Court expressly found, after a trial, that the charges were not in fact so stigmatizing as to interfere with the plaintiff's abilities to find other similar jobs.

In addition, the District Court ignored three aggravating factors which other courts have held increase the stigma and reputational harm and thereby elevate the severity of allegations made as grounds for dismissal. These are (1) the degree of dissemination of the charges; (2) the timing of the termination; and (3) the nature of the position held.

Thus, in Birnbaum there was local publicity through the union and notification of other hospitals. In Suarez another agency was informed of the charges. In Newcomer and Hirsch there was widespread newspaper publicity, and in each the court found this publicity important in assessing the injury to liberty. In Buggs v. City of Minneapolis, supra., dissemination to futnre employees as a result of inclusion in the employee's personnel records was found to be an aggravating factor. In Constantineau the plaintiff's drunkenness was "posted" as a public warning. Contrast, Sayah v. U.S., supra, at 355 F. Supp. 1015 ("No one has posted this letter in the halls of every employment agency in the City of Los Angeles.") The publicity about the plaintiff's discharge and the reasons for it was widespread, and his dismissal was publicly labeled a "firing " (see Plaintiff's Memorandum, Doc. No. 19, pp. 22-24).

In addition, regardless of the plaintiff's property interest, it is undeniable that the timing of the plaintiff's dismissal was

unusual for a probationary employee, in that it came well before a decision would ordinarily have been expected as to whether he would attain permanent status in his position. A mid-term dismissal inevitably has a stigmatizing effect that a mere nonrenewal or failure to retain does not have. Thus, the District Court in Carpenter, supra., wrote, at 358 F Supp. 225:

> And, of course, dismissing a teacher abruptly during the year rather than simply failing to renew her contract leaves a stigma that clouds her professional status and limits her future opportunities.

See also Cooley v. Board of Education of Forest City School District, 453 F2d 282 (8 Cir., 1972) and Nichols v. Eckert, 504 P2d 1359 (Supreme Court, Alaska, 1973), at 286. In a case which might otherwise be close to the borderline of per se stigma, these elements, both present here, are enough to make the difference.

Furthermore, the courts have indicated that charges made against a professional are inherently more career-damaging and stigmatizing than against other types of employees. Thus, in Hanter, which involved the assistant director of the city human rights organization, the Court noted that future employability is "particularly susceptible to damage in the case of a person who is seeking employment in high levels of city government, where employability is highly dependent upon professional reputation and past employment performance and where employers can properly demand the fullest disclosure of an applicant's personal and employment history," 325 F. Supp. 847 , at 854. See also Newcomer, where the plaintiff was the director of a public housing authority;

Suarez and Birnbaum, which involved doctors; Hostrop, where the plaintiff was a junior college president; and Hirsch, which involved an assistant district attorney.

The District Court below relied on Russell v. Hodges, 470 F2d 212 (2 Cir., 1972), the leading case on this issue in this Circuit, to reject the plaintiff's claim [Memorandum of Decision, p. 21] The rule laid down in Russell, however, is not the same as the rule enunciated by the District Court, for Russell stated:

> ...we believe the Court was thinking of something considerably graver than a charge of failure to perform a particular job, lying within the employee's power to correct..., ibid,, at 217.

Russell did not require, as did the District Court, that a defective personality trait be beyond the employee's capacity to change. Nor could it have done so in light of the Supreme Court ruling in Constantineau, since alcoholism is generally recognized as a treatable disease.

Russell involved four different employees, only one of whose cases is applicable here. The plaintiff Fletcher, the key case, was given a statement charging him with "sleeping on duty, absence from his post without authorization, and wearing improper attire," ibid., at 215, n.2. The Circuit Court recognized that the charges of incompetence in Fletcher's case approached the Roth standard for a deprivation of liberty, describing his claim as "a shade closer," ibid., at 217, to a deprivation of liberty, but nevertheless rejected his claim. There are, however, enormous and important differences between the charges against the plaintiff and those against Fletcher in Russell. In Fletcher's case, unlike in the

present case, the charges did not imply character defects as did those against Mr. Calo but were closer to charges of laziness and perhaps sloppiness; they did not suggest an inability to handle other similar jobs; there was no dissemination of the charges; and they did not involve the additional stigma that arises when such charges are leveled against one in a position of professional responsibility. They were essentially allegations of "mere" incompetence. The alleged injury to the plaintiff goes far enough beyond the injury to Fletcher to take his case out of the Russell decision.

If the Court wishes to look to a similar case for comparison, it should look to Carpenter v. City of Greenfield School District No. 6, 358 F. Supp. 220 (E.D. Wisc., 1973), which involved charges of similar nature and severity, although without the added element of publicity present here. There a school teacher was charged, inter alia, with screaming at pupils and administering degrading punishments to them. Compare also the allegations of maladministration in Newcomer v. Coleman, supra.

C. THE DISTRICT COURT'S PER SE RULE IS NOT MANDATED BY ROTH AND SINDERMAN.

The District Court recognizes that a literal reading of Roth and Sinderman does not support its imposition of a per se rule for the assessment of stigmatizing effect [Memorandum of Decision, p. 16] Indeed, Roth strongly implies that the plaintiff is entitled to put on proof to show that his interest in future employability has been damaged, 408 U.S. 574, n. 13. Following this conclusion, a number of courts have in fact taken testimony on the

actual impact of the discharge, Abeyta v. Town of Taos, 499 F2d 232 (10 Cir., 1974); Buggs v. City of Minneapolis, 358 F. Supp. 1340 (D. Minn., 1973); Ortwein v. Mackey, 358 F. Supp. 705 (M.D. Fla., 1973).

The only per se rule arising from Roth is that mere nonretention in a position, without more, will not sustain a cause of action, even though a certain amount of stigma may attach to a mere nonretention. The District Court is reasonable in concluding from the case law that certain categories of charges have been treated by the courts as per se damaging. The plaintiff submits that his case falls into this per se category. But there is also a third area between these two per se categories where it is impossible to assess the damage to the plaintiff's liberty without some more complete examination of the facts, at which the plaintiff can attempt to show the harmful effect of the charges upon his reputation or his future employability. If the plaintiff's case fails to meet the per se test, it at least falls within that intermediate category of injuries which entitles the plaintiff to a trial to try to prove his case. See, for example, Ford v. Jones, 372 F. Supp. 1187 (E.D. Ky., 1974).

The District Court suggests that anything other than a per se rule would be self-defeating, in that employers would be discouraged from stating any reason at all for their dismissals. That reasoning, however, has no applicability to this case, since by law the Parking Authority defendants were required to provide a statement of reasons for dismissal and, without doing so, could not have dismissed the plaintiff mid-probation.

Furthermore, it is the relatively narrow construction of liberty and property by the Supreme Court in Roth and Sinderman that encourages employers to dismiss without stating reasons. A good deal of lower court law, which the Court overturned in those cases, suggested that any governmental employee being terminated had a right to notice of the charges against him. The Court instead adopted the position that an employee has no such right unless he has a property interest in the job. An employer otherwise need not provide a statement of reasons. That is the decision that will discourage an employer from informing an employee of the cause of his discharge. Once, however, the government chooses to provide reasons, and if those reasons damage the employee's reputation or opportunity for future employment, then it is hardly unreasonable to ask that it afford the employee a hearing on the validity of those reasons so that he can clear his name. If the Roth rule discourges employers from informing employees without property interests of the reasons for their dismissal, it is only because to give those reasons would harm the employee in a manner which infringes his liberty.

IV. THE PLAINTIFF'S ALLEGATIONS THAT THE DEFENDANTS CONSPIRED TO DEPRIVE HIM OF LIBERTY AND PROPERTY WITHOUT DUE PROCESS OF LAW STATE A CAUSE OF ACTION UNDER 42 USC 1983.

It is established in the Second Circuit that a cause of action for conspiracy can be maintained under 42 USC 1983, and need not rest on the equal rights requirement of 42 USC 1985(3), Birnbaum v. Trussel, 371 F2d 672 (2 Cir., 1966). See also Lewis v. Brautigam, 227 F2d 124 (5 Cir., 1955). Furthermore, individuals can be part of a conspiracy in either their individual or official

official capacities, so long as the conspiracy itself acts under color of law, Bond v. County of Delaware, 368 F. Supp. 618 (E.D. Pa., 1973).

The Parking Authority defendants and the Civil Service Commission defendants each consulted within their respective groups, and, at least through the defendants, Albert E. Provost and Victor Mambruno, consulted between their groups. They all acted in a common enterprise to deprive the plaintiff of his position contrary to the Fourteenth Amendment.

The plaintiff submits that he has alleged sufficient facts to state a cause of action (i.e., the plaintiff's "Fourth Cause of Action" in his complaint). As a result, the plaintiff's conspiracy count should survive a motion to dismiss or summary judgment, unless the Court concludes that the plaintiff has failed to state a cause of action as to any of the other counts.

V. THE DISTRICT COURT SHOULD NOT HAVE TREATED THIS CASE AS RIPE FOR SUMMARY JUDGMENT.

Vital facts have at all times been in dispute between the parties, affecting all aspects of the plaintiff's complaint. These include the true motivation for his discharge (see pp. 508 supra.); the nature of the mutual understandings between the parties and the usual practice of the City of Waterbury regarding the duration of a civil service employee's probationary period (see pp. 25 - 26), supra; the circumstances leading to the public dissemination of the charges against the plaintiff (see pp. 30 - 33 , supra.); and the effect of these charges upon the plaintiff's good name, reputation, and ability to find other employment (see pp. 42 - 44 , supra.). The plaintiff was unaware that

the District Court viewed the complaint as suitable for summary judgment and had no opportunity to present to that court affidavits to supplement the verified complaint detailing these important factual differences.

Under circumstances such as these, the entry of summary judgment by the District Court is improper, Dale v. Hahn, 440 F2d 633 (2 Cir., 1971), at 638; Illinois State Employees Union v. Lewis, 473 F2d 561 (7 Cir., 1972), at 565-66.

CONCLUSION

The appellant prays that this Court reverse the decision of the District Court and remand this action to that court for a trial upon the merits of the plaintiff's claims.

PLAINTIFF

By Raphael L. Podolsky

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CERTIFICATION

I hereby certify that a copy of the foregoing has been sent by U.S. Mail, postage prepaid to John Phelan, Corporation Counsel, 236 Grand St., Waterbury, Conn., and Frank Healey, Healey & Healey, 66 Linden St., Waterbury, Conn.

Raphael L. Podolsky
Commissioner of the Superior Court